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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGEMENT NO.221 OF 1999
IN
SUMMARY SUIT NO.4591 OF 1999

Canara Bank and others — Plaintiffs
versus
M/s.Solar Busiform Limited — Defendant

Mr.N.Engineer i/by S.D.D. & Phatarphekar for plaintiffs.
Mr.Hemant Ghadigaonkar h/f Madhav Jamdar for defendant.

CORAM : A.S.OKA, J.

DATE ON WHICH THE JUDGEMENT IS RESERVRD : 03-12-2009

DATE ON WHICH THE JUDGEMENT IS PRONOUNCED : 14-01-2010

JUDGEMENT :-

1. This Summons for Judgment taken out in the year 1999 has remained pending for various reasons. It appears that the suit was wrongly transferred to the Debt Recovery Tribunal. By order dated 7th March 2000 this Court noted the submission of the learned counsel for the plaintiffs that the suit has been wrongly transferred to the Debt Recovery Tribunal. A statement of the learned counsel for the plaintiffs was recorded that the plaintiffs would take up the matter with the Prothonotary & Senior Master for calling back the papers of the suit. Thereafter the papers of the suit were sent back to this Court by the Debt Recovery

Tribunal. The Summons for Judgement remained pending in this Court and in fact on 12th August 2009 the suit was placed for dismissal under Rule 227 of the Bombay High Court (Original Side) Rules. This Court directed that the Summons for Judgment shall be placed for hearing. This Court also recorded that an affidavit would be filed by the plaintiff setting out the bifurcation of the computation of interest and penal interest. It was recorded in the order that the affidavit will also deal with the issue of bar of limitation.

2. The suit is filed by the plaintiffs for recovery of a sum of Rs.1.00 crore paid by the plaintiffs to the first defendant company towards subscription of one lakh 14% fully secured non convertible debentures ("NCDs" for short) together with interest thereon as well as further interest thereon from the date of institution of the suit till realization @ 17% p.a.. A claim is also made for recovery of Rs.20.00 lakhs being the amount of short term deposit (hereinafter referred to as "STD") placed by the plaintiffs with the first defendant company together with interest thereon till the date of institution of the suit and for further interest @ 20% p.a. on the said amount of Rs.20.00 lakhs from the date of institution of the suit till disposal of the suit.

3. The case made out in the plaint is that the plaintiffs are the trustees of the Canbank Mutual Fund which is a trust constituted under the Indian Trusts Act, 1882. The first defendant is a limited company and the second and third defendants are the Chairman and Managing Director

respectively of the first defendant company. The fourth defendant is the Official Liquidator, High Court, Bombay who was appointed as Liquidator of the first defendant company.

4. The case of the plaintiffs is that on the request made by the first defendant company the plaintiffs agreed to subscribe one lakh 14% fully secured NCDs of the first defendant of the face value of Rs.100/- each for an aggregate sum of Rs.1.00 crore on a private placement basis. The terms and conditions were incorporated in sanction letter dated 21st June 1990 issued by the plaintiffs to the first defendant company. It was provided therein that the subscription amount of the NCDs would be redeemed in five equal annual installments payable on expiry of third, fourth, fifth, sixth and seventh year from the date of allotment. It was provided that the NCDs shall carry interest @ 14% p.a. payable half yearly. It was provided that in case of a default in payment of the interest on the due date, a penal interest of 2% over and above the agreed rate will be payable for the defaulting period. It was provided that additional service charge shall be payable @ 1% p.a. along with half yearly interest payable by the company.

5. According to the case of the plaintiffs in consideration of the subscription to the NCDs, the second and third defendants gave personal guarantees in favour of the plaintiffs. The second and third defendants irrevocably and unconditionally guaranteed the due performance and observance by the first defendant company of its obligations under the

said NCDs subscription and promised to pay on demand all sums of money payable by the first defendant to the said company.

6. On the request made by the first defendants, the plaintiffs agreed to place with the first defendant company a short term deposit of an amount of Rs.20.00 lakhs on the terms and conditions recorded in letter dated 28th February 1991. The said deposit was to be repaid by the first defendant company with interest @ 20% p.a. within twelve months of the date of disbursement in two half yearly installments of Rs.10.00 lakhs. A Deposit Agreement dated 20th February 1991 was executed by the first defendant company. The first defendant company agreed to pay interest @ 22% p.a. on the unpaid amount of deposit and interest. The amount of Rs.20.00 lakhs was paid by the plaintiffs to the first defendant company in two equal installments of Rs.10.00 lakhs each on 20th February 1991 and 27th February 1991 respectively. According to the case of the plaintiffs, to secure the repayment of the amount payable under the said STD, the promoters/ directors of the first defendant company pledged the equity shares held by them in favour of the plaintiffs. The first defendant company also executed a demand promissory note in the sum of Rs. 20.00 lakhs on 20th February 1991 in favour of the plaintiff.

7. Reliance is placed in the plaint on correspondence made between the parties. The plaintiffs have pointed out that the defendants were called upon to pay the amounts and from time time assurances were given by the defendants in writing to pay the amount. Reliance is placed

by the plaintiffs on various alleged acknowledgements in writing of the defendants by which they allegedly acknowledged their liability to pay the debt. The plaintiffs have prayed for a decree in the sum of Rs. 3,12,88,177/- being the amount of sum of Rs.1.00 crore paid by them towards NCDs and interest payable thereon till 31st July 1998. The plaintiffs prayed for further interest on the amount of Rs.1.00 crore @ 17% p.a. from 1st August 1998 till payment or realization. The plaintiffs also prayed for a decree in the sum of Rs.77,02,955=27 Ps.. The said amount includes principal amount of STD of Rs.20.00 lakhs and interest of Rs. 57,02,955=83 Ps. payable thereon. The plaintiffs claimed interest @ 20% p.a. on the sum of Rs.20.00 lakhs from 1st August 1998 till the disposal of the suit. At this stage it must be noted that in the affidavit-in-rejoinder dated 18th September 2009 filed by the plaintiffs it is stated that the plaintiffs have decided to restrict the claim for interest and they are claiming interest @ 14% p.a. on the NCDs..

8. To the Summons for Judgment taken out by the plaintiffs a reply has been filed by the third defendant for himself and on behalf of first defendants. In the reply it is submitted that the alleged cause of action available to the plaintiffs for recovery of the amount payable towards NCDs is against all the defendants and the alleged cause of action available to the plaintiffs for recovery of the claim towards STD is only as against first defendants. It is submitted that the suit suffers from mis-joinder of causes of action. It is submitted that in view of what is stated in letter dated 21st June 1990, the plaintiffs are not entitled to claim any

future interest. It was contended that the suit was barred by limitation. It is submitted that certain material letters are not produced by the plaintiffs. It is contended that the plaintiffs allowed the security of the pledged shares to be wasted as the plaintiffs did not accept the proposal of the first defendants in their letter dated 3rd June 1993 by which the first defendants came out with a proposal to offer two lakh shares of the first defendants at the price of Rs.15/- per share aggregating to Rs.30.00 lakhs. It is submitted that the said offer was renewed by the first defendant by letter dated 24th June 1994 and at that time the price of shares of first defendants company was Rs.25/- to Rs.26/- per share. It is contended that the plaintiffs did not accept the said offer and thereafter the share market went down. It is submitted that the plaintiffs have not claimed the contractual rate of interest.

9. The learned counsel for the plaintiffs in support of the Summons for Judgment invited the attention of the Court to the annexures to the plaint. The annexures are in the nature of correspondence between the parties. He submitted that the defendants have repeatedly acknowledged their liability in writing and, therefore, the suit is not barred by limitation as the said acknowledgements extend the period of limitation. He submitted that the liability of the defendants is admitted by the defendants as is clear from the correspondence. He submitted that in absence of necessary authorization the pledged shares could not be sold. He invited the attention of the Court to the correspondence made in that behalf. He submitted that in view of Rule 3 of Order II of the Code of Civil Procedure,

1908, it was permissible for the plaintiffs to club the causes of action in this suit. He submitted that first and second defendants have no defence and, therefore, the first and third defendants are not entitled to leave to defend the suit. He submitted that an ex-parte decree be passed against the second defendant as the said defendant has not entered appearance.

10. The learned counsel for the first and third defendants submitted that a summary suit under Order XXXVII, Rule 2 of the said Code was not maintainable. He submitted that the causes of action based on NCDs and STD were different and the alleged cause of action as far as STD is concerned was only against first defendants and not against the other defendants. He submitted that none of the letters on which reliance is placed by the plaintiffs show that their is any acknowledgement of debt on the part of first and third defendants. He submitted that there are several triable issues in the suit and, therefore, the defendants are entitled to unconditional leave to defend the suit.

11. The learned counsel for the plaintiffs in the reply placed reliance on the decision of this Court in the case of **M/s.R.Sureshchandra and Company Vs. M/s.Vadnere Commercial Works and another (AIR-1991-Bom-44)**. He submitted that section 25(3) of Indian Contract Act, 1872 validates a promise to pay the debt barred by limitation. He submitted that this Court has held that a clear promise after expiry of period of limitation can provide a fresh period of limitation and such a promise can also be inferred from necessary implication.

12. I have given careful consideration to the submissions. In the present case there is no delay in taking out the Summons for Judgement. The delay is in disposal of the Summons for Judgement. A perusal of the reply filed by the third defendant to the Summons for Judgement shows that the said reply has been filed by him for himself and on behalf of the first defendant. In the said reply there is no denial of the fact that the plaintiffs paid to the first defendant company a sum of Rs.1.00 crore on 29th June 1990 towards the subscription of one lakh 14% fully secured NCDs of the face value of Rs.100/- each issued by the first defendants. There is also no dispute that a sum of Rs.20.00 lakhs was paid by the plaintiffs to the first defendant company in two equal installments of Rs. 10.00 lakh each on 20th February 1991 and 27th February 1991 respectively towards STD of an amount of Rs.20.00 lakhs. The plaintiffs have placed reliance on letter dated 21st June 1990 sent by them to the first defendants recording terms and conditions on which Canbank Mutual Fund, of which the plaintiffs are the trustees, was agreeable to subscribe one lakh 14% fully secured NCDs of Rs.100/- each on private placement basis. A perusal of the reply filed by the third defendant shows that there is no dispute about the said letter dated 21st June 1990. However, it is contended that the said letter was received without any enclosures. The said letter records that the terms and conditions for the issue of NCDs on private placement basis were annexed to the said letter. It must be stated here that the said terms and conditions provide that the NCDs shall bear interest @ 14% p.a. payable half yearly. It also records a condition that

the first defendants shall pay commitment fee @ 2.5% of the face value of the debentures agreed to be subscribed. The terms and conditions also provide that the first defendant shall pay a premium of 5% of the face value of the debentures at the time of redemption. It is provided that the debentures shall be redeemable at the expiry of third, fourth, fifth, sixth and seventh year in five equal installments of Rs.21/- each from the date of allotment. At this stage it must be noted here that in none of the letters sent by the first defendants which are placed on record of the suit the first defendants or third defendant have come out with the case that the said annexure to the letter dated 21st June 1990 was not served to the first defendants. In fact, in the letters sent by the first defendants, the terms and conditions which form part of the annexure to letter dated 21st June 1990 have been set out by the first defendants. Letter dated 16th October 1993 (Exhibit-N) refers to payment of interest on the NCDs.. The provision regarding payment of interest on NCDs is contained in the terms and conditions annexed to letter dated 21st June 1990. It is pertinent to note that in the correspondence made by the plaintiffs the said terms and conditions have been set out and relied upon but at no stage a contention was raised by the first defendants that the annexure of the said letter was not received by them. In fact, in the reply to the suit notice there is a reference to the stipulation regarding payment of interest @ 14% payable half yearly on the NCDs.. Therefore, the contention that the first defendants had not received the annexure to the letter dated 21st June 1990 containing terms and conditions is clearly an after thought and the same cannot be accepted. The third defendant in his affidavit has not

disputed the Deed of Guarantee dated 26th June 1990 executed by second and third defendants. There is no dispute regarding placement of STD of Rs.20.00 lakhs by the plaintiffs with the first defendants. There is no dispute regarding execution of deposit agreement by and between the plaintiffs and the first defendants and execution of deposit receipt in the sum of Rs.20.00 lakhs by the first defendants.

13. By letter dated 8th July 1992 sent by the plaintiffs to the second defendants, a grievance was made that after the plaintiffs received interest on 1st July 1991 on the NCDs, no further interest has been paid by the defendants. In letter dated 3rd September 1992 sent by the plaintiffs to the first defendants it was stated that the defendants have neither repaid the amount payable under the STD nor has paid interest thereon. In letter dated 3rd June 1993 (Exhibit-M to the plaint) sent by the third defendant on behalf of first defendant to the plaintiffs, it was accepted that the first defendant company had availed of STD of Rs.20.00 lakhs against pledge of two lakh shares of the first defendants held by the promoters in the year 1991. By the said letter the first and third defendants informed the plaintiffs that the promoters of the company were willing to offer the pledged two lakh shares to the plaintiffs @ Rs.15/- per share aggregating to Rs.30.00 lakhs. It was stated that the aforesaid sale proceeds of Rs.30.00 lakhs should be adjusted against the amount due and payable against said STD by the first defendant in the sum of Rs. 25.00 lakhs (payable up to 31st March 1993). The balance amount out of Rs.30.00 lakh should be adjusted against the interest payable by the first

defendants on the NCDs.. In letter dated 16th October 1993 sent by the first defendants to the plaintiffs liability of the first defendant was accepted. By the said letter the first defendant sought time up to 31st March 1994 on the representation that the first defendants were likely to receive the entire call money of rights issue of its shares. In letter dated 24th June 1994 sent by the third defendant on behalf of the first defendants, again an offer was given to purchase two lakh fully paid up shares which were given to the plaintiffs by way of security at the price of Rs.25/- to Rs.26/- per share. It was stated in the letter that the amount to be realized could be adjusted against STD and interest thereon. It was provided that the balance amount can be adjusted towards interest on NCDs..

14. The plaintiffs by their letter dated 5th October 1994 requested the first defendants to issue proper authorization letters from the concerned pledgers for disposal of the shares and for adjustment of the sale proceeds towards liquidation of overdue liabilities under STD/NCDs.. It must be noted here that on 8th December 1995 the first defendants wrote a letter to the plaintiffs. The first defendants again offered equity shares standing in the name of the promoters/directors. It was stated that the commitment for future interest as well as debenture release can be arranged for by the first defendants from their own funds. However, in the said letter it is not stated that the first defendants were willing to give authorization letters.

15. In letter dated 18th July 1996 sent by the third defendant on behalf of first defendants the liability to make payment of interest on STD and the STD amount was accepted. The promise was to procure some money by March 1996. The first and third defendants sought personal meeting with the plaintiffs.

16. One of the most important letters is letter dated 23rd May 1997 (Exhibit-S to the plaint). The first defendants has stated thus :-

> "Ref. : Your letter No.CIMS/P/034/NR/PKR dated 16.05.77.
>
> Sub. : Payment of dues.
>
> We are in receipt of your letters. We were expecting certain funds and that is why wanted to write you along with some cheque. So far due to liquidity crunch, we couldn't send any payment. Please bear with us. We are trying hard and would try to send you some payment in a week or two."

17. In the notice dated 16th December 1997 sent by the advocate for the plaintiffs to the first defendants claim of Rs.2,69,27,242=40 with further interest thereon @ 21% p.a. was made towards NCDs and a claim of Rs.68,17,247/- including interest was made towards STD.. A reply was issued by the advocate for the first defendant to the said notice. In paragraph 3 of the reply it was contended that the defendants were not liable to pay interest @ 22% p.a. or 21% p.a.. Paragraph 4 of said reply read thus :-

> "4. That it is pertinent to note that your client have claimed a sum of Rs.1,64,27,242=00 towards interest

> accrued till 30.9.97 on 14% non-convertible debentures, which seems to be not calculated as per the terms and conditions mentioned in letter dated 21.6.93. My client hereby denied that a sum of Rs.1,64,27,242/- are due and payable to your clients on account of interest. The amount of interest seems to be inflated and excessive due to charging of interest on interest. Therefore, a scrutiny is essential to ascertain the true outstanding on account of interest accrued. My client always reminded your client to rectify the calculations of interest. However, your client mischievously neglected and informed true amount of interest up till now. In fact, my client is liable to pay a sum of Rs.83,87,197=75 Paisa on account of interest accrued till 30.9.1997."

As far as interest on STD is concerned, in paragraph 5 the first defendants stated that they were liable to pay interest of only Rs. 22,00,548/-. The relevant part of paragraph 5 reads thus :-

> "5. ... ... Therefore, my client hereby denied that a sum of Rs.48,17,247/- are payable to your client on account of accrued interest till 25.11.1997. Therefore, the scrutiny is required to ascertain the true outstanding on account of interest accrued. My client always reminded your client to rectify the calculations of interest. However, your client mischievously neglected and did not informed true amount of interest up till now. In fact, my client is liable to pay only Rs.23,00,548/- on account of interest accrued till 31.12.1997."

In paragraph 6 of the reply it was stated that the commercial market was slack and a sum of Rs.90.00 lakhs is due and payable to the defendants from government institutions. In the reply it is stated that the first defendants were ready and willing to pay the amounts as mentioned in paragraphs 4 and 5 of the said reply. Thus, even in the said reply the first defendants unequivocally acknowledged its liability to repay the amounts payable under the NCDs as well as under STD.. The only contention is

that they are liable to pay lesser interest than what was claimed by the plaintiffs.

18. Thus, there is clear acknowledgement of debt by the first defendants by the said reply insofar as principal amount and a part of interest is concerned. Even in letter dated 16th October 1993 the liability has been accepted. As far as STD is concerned, the liability has been admitted by the first defendants in letter dated 21st June 1994. The liability has been admitted even in letter dated 18th July 1996.

19. By notice dated 16th December 1997 the plaintiffs claimed following amounts :-

"Principal amount due	:	Rs.1,00,00,000=00
Interest accrued till 30.9.97 (after giving credit for interest paid)	:	Rs.1,64,27,242=00
Redemption premium	:	Rs. 5,00,000=00
Total	:	Rs.2,69,27,242=40"

"Principal amount due	:	Rs. 20,00,000=00
Interest accrued till 25.11.1997	:	Rs. 48,17,247=00
Total	:	Rs. 68,17,247=00"

The response of the first defendants was that as far as NCDs are concerned it was liable to pay interest of Rs.83,87197=75 Ps. till 30th

September 1997. The first defendants showed willingness to pay a sum of Rs.23,00,548/- towards interest on STD as on 31st December 1997. Therefore, to that extent, the liability has been accepted by the first defendants as well as by the third defendants who has made the correspondence on behalf of first defendants.

20. In the rejoinder filed by the plaintiffs on 18th September 2009 it is stated that the plaintiffs are restricting their claim of interest @ 14% p.a. on NCDs and @ 20% p.a. on STD.. These are the rates respectively specified in letter dated 21st June 1990 (Exhibit-B) and in the deposit agreement at Exhibit-F. The plaintiffs have submitted the calculations. Exhibit-5 to the said affidavit records that by calculating the interest @ 14% p.a. on the NCDs the total interest payable is Rs.2,30,81,369=86. In Exhibit-6 to the said affidavit it is pointed out that the interest receivable on STD as on 31st August 2009 was Rs.70,72,876=69 Ps.. This calculation is made @ 20% p.a..

21. In view of the admissions in the admitted correspondence on record it is not possible to accept that the first and third defendants have any plausible defence. They have repeatedly accepted their liability to pay the principal amounts payable under the NCDs and STD. The terms and conditions of repayment are reflected from the admitted correspondence. The claim for interest has been confined to the agreed rates. Thus practically there is no defence. However, considering the fact that hearing of the Summons for Judgment was inordinately delayed, conditional leave

to defend deserves to be granted to the first and third defendants subject to deposit of substantial amounts. As far as third defendant is concerned, the liability is restricted to amount payable under the NCDs.. As stated earlier, as on 30th September 1997 the first and third defendants accepted their liability to pay interest of Rs.83,87,197=75 Ps.. Similarly, the first defendants accepted the liability to pay interest of Rs.23,00,548/- on the STD.. As on 31st August 2009 the interest on NCDs is approximately Rs.2.30 crores and the interest on the STD is approximately Rs.70.00 lakhs. As a condition for defending the suit, the first and third defendants will have to jointly and severally pay a sum of Rs.3.00 crores(Rs.1.00 crores principal + Rs.2.00 crores towards interest) towards liability on account of NCDs and the first defendant will have to pay a sum of Rs.80.00 lakhs (Rs.20.00 lacs principal + Rs.60 lacs on account of interest) on account of liability of STD..

22. Hence, the Summons for Judgment is disposed of by passing following order :-

I) The first and third defendants are granted leave to defend subject to following conditions :

(a) That the first and third defendants shall deposit with this Court a sum of Rs.3.00 crores (Rs.Three crores only) within a period of four months from today;

(b) In addition to the aforesaid amount, the first defendant shall deposit a sum of Rs.80.00 lakhs (Rs.Eighty lakhs only) with this Court within a period of four months from today;

II) It is clarified that on deposit of a sum of Rs.3.00 crores, leave to defend will stand granted in favour of third defendant;

III) On the conditions being complied with by the first and third defendants, the suit shall be transferred to the list of commercial causes;

IV) If the conditions are not complied with within the stipulated time , the suit shall be placed on board for passing a decree;

V) It will be open for the plaintiffs to apply for an ex-parte decree against the second defendants.

(A.S.OKA, J.)